90-1498

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1990

THOMAS GARDNER, Individually, and as Executive Director of the Florida Department of Natural Resources, and MAJOR RONALD MCCULLERS, Individually, and as Monroe County District IX Supervisor of the Florida Marine Patrol,

Petitioners,

v.

FREEMAN R. BATEMAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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March __, 1991

QUESTION PRESENTED

In this case challenging the validity of a Florida Statute, the Circuit Court below affirmed an award by the District Court of $80,399.76 in attorney's fees and costs pursuant to 42 U.S.C. § 1988. This petition raises the following questions which go to the validity of the two bases of the award:

1.

DOES THE MAGNUSON FISHERY CONSERVATION AND MANAGEMENT ACT CREATE RIGHTS FOR THE PLAINTIFF WHICH ARE ENFORCEABLE PURSUANT TO 42 U.S.C. § 1983 THEREBY ENTITLING PLAINTIFF TO AN AWARD OF ATTORNEY'S FEES PURSUANT TO 42 U.S.C. § 1988?

2.

DOES FLORIDA'S ENFORCEMENT OF ITS STATUTES ON THE HIGH SEAS AGAINST ONLY FLORIDA REGISTERED VESSELS CONSTITUTE UNLAWFUL DISCRIMINATION AGAINST ITS OWN CITIZENS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION?

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OPINIONS BELOW

The decision on the merits is reported as *Bateman v. Gardner,* 716 F.Supp. 595 (S.D. Fla. 1989).

The order awarding attorney's fees is reported as *Bateman v. Gardner,* Case No. 87-10062-Civ-King (S.D. Fla. Jan. 12, 1990).

The decision from the Eleventh Circuit Court of Appeals is reported as *Bateman v. Gardner,* Case Nos. 89-5851 and 90-5125 (11th Cir., Dec. 20, 1990).

JURISDICTION

The decision of the Eleventh Circuit Court of Appeals below directly conflicts with a decision of the Ninth Circuit on an identical federal question. The Ninth Circuit, in *North Pacific Vessel Owners Assoc. v. Sheffield,* 852 F.2d 572 (9th Cir. 1988)(unpublished opinion attached at appendix "E"), held that the Magnuson Act did not create individual rights enforceable under 42 U.S.C. § 1983; the court below in this case found that the same act did create such enforceable rights.

The decision of the Eleventh Circuit also directly conflicts with this Court's decision in *Skiriotes v. Florida,* 313 U.S. 69 (1940). In that case, this court held that a fishing regulation applicable to Florida citizens on the high seas was a valid exercise of the state's sovereign power that cannot violate the equal protection clause of the fourteenth amendment to the United States Constitution. The holding in this case directly conflicts with *Skiriotes* by finding a Florida fishing regulation applicable in federal waters only to Florida registered vessels does violate the equal protection clause.

The Court of Appeals for the Eleventh Circuit rendered the judgment sought to be reviewed on December 20, 1990. This Court has jurisdiction to issue a writ of certiorari to the court below pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves construction of:

Equal Protection clause of Amendment XIV, *United States Constitution;*

Magnuson Fisheries Conservation and Management Act, 16 U.S.C. § 1801, *et seq.;*

Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico, 50 C.F.R. 658, *et seq.;*

42 U.S.C. §§ 1983, 1988; and

Section 370.151, Florida Statutes (1987).

(See appendix for relevant text of statutory provisions.)

This Court should exercise its discretionary review of this case because the decision of the United States Court of Appeals for the Eleventh Circuit (1) has rendered a decision which is in conflict with the decision of another court of appeals on the same matter [SC R10.1(a)]; (2) raises an important question of federal law which has not been, but should be, settled by this Court [SC R10.1(c)]; and (3) has decided a federal question in a way which conflicts with applicable decisions of this Court [SC R 10.1(c)].

STATEMENT OF THE CASE

Respondent, Freeman R. Bateman, is a Florida resident and Florida licensed fisherman. He brought this action in the United States District Court for the Southern District of Florida asserting that § 370.151, Florida Statutes, was preempted by the enactment of the Magnuson Fishery Conservation and Management Act (hereafter Magnuson Act), 16 U.S.C. § 1801 *et seq.*, and its implementing regulations, specifically 50 C.F.R. 658, *et seq.* The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1343, 42 U.S.C. § 1983 (civil rights), 28 U.S.C. § 2201 (declaratory judgment), and 16 U.S.C. § 1861(d)(Magnuson Act).

Section 370.151, Florida Statutes, designates the Tortugas Shrimp Bed as an area where shrimping would be prohibited. The sanctuary described in § 370.151, Florida Statutes, includes areas within the exclusive economic zone of the United States, outside Florida territorial waters. Florida acknowledged that it could, and did, enforce this prohibition in the area beyond the territorial sea against Florida registered vessels only. The Magnuson Act explicitly authorizes states to regulate "vessels registered under the law of that State" in federal waters. 16 U.S.C. § 1856(a)(3).

Subsequently, the Department of Commerce created its own shrimp sanctuary in the same area, which sanctuary did not include all of the state-established sanctuary. 50 C.F.R. 658.22. The area included in the state sanctuary, but excluded from the federally created sanctuary, is the subject of this case.

The Respondent asserted in the District Court that the Florida regulation in that zone was not valid because: 1) the Respondent had a right to fish in federal waters under the Magnuson Act free of state regulation; 2) the state created

sanctuary in federal waters was preempted by the federally created sanctuary in the same area; and 3) by regulating the shrimping activities of its citizens but not those of other states, the statute violated the equal protection clause.

The case was decided on cross motions for summary judgment. The District Court invalidated the state created sanctuary on two grounds: 1) because "the net effect of the Florida legislature's action was discrimination against its own citizens," (*Bateman v. Gardner,* 716 F.Supp. 595, 597 (S.D. Fla. 1989), it violated the equal protection clause, and 2) the federal regulation preempted the state sanctuary.

On January 12, 1990, the District Court issued its order awarding attorney's fees pursuant to 42 U.S.C. § 1988. The court based the award on two findings. First, the court found a violation of the equal protection clause, and, second, the court held that the Magnuson Act creates rights enforceable under 42 U.S.C. § 1983 thereby allowing for § 1988 fees to be awarded for the court's holding under the Supremacy clause.

On appeal, the Eleventh Circuit, on December 20, 1990, affirmed the two orders of the lower court by a *per curiam* summary affirmance without opinion relying on the opinions below. (See appendix "C"). The United States sought clarification on the equal protection holding, expressing the view that this construction of the equal protection clause would impair the cooperative regulatory scheme between the state and federal governments in federal waters. (Motion attached at appendix "H"). That motion was denied.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISION OF ANOTHER CIRCUIT COURT OF APPEAL ON THE SAME QUESTION OF LAW.

By affirming case no. 90-5125 (the award of attorney's fees), the Eleventh Circuit affirmed the District Court's holding that the Magnuson Act created "rights enforceable under § 1983." (App. "B"). Because the Supremacy Clause does not, of its own force, create rights enforceable under § 1983 (*Dennis v. Higgins,* 59 U.S.L.W. 4117, 4120 (Feb. 20, 1991)), the District Court found an individual right of action under the Magnuson Act and awarded Respondent attorney's fees under 42 U.S.C. § 1988.

The District Court below gave scant explanation for its conclusion that such a right exists and the Eleventh Circuit affirmed without opinion. In contrast, the Ninth Circuit applied the analysis found in the opinions of this Court for this question and determined that no such right existed under the Magnuson Act. *North Pacific Vessel Owners' Assoc. v. Sheffield,* 852 F.2d 572 (9th Cir. 1988)(unpublished opinion, affirming denial of attorney's fees under 42 U.S.C. § 1988, attached at appendix "E").

In *Sheffield,* the Ninth Circuit applied the two-pronged analysis set forth in *Golden State Transit v. Los Angeles,* 107 L.Ed.2d 420 (1989), to the Magnuson Act and found that there was no "right to fish" created by the Act that would be enforceable under § 1983. That court also found that the enactment of a comprehensive enforcement scheme fore-

closed any private enforcement of the Act through § 1983. Consistent with earlier Ninth Circuit opinions, that court held that the plaintiffs therein were incidental beneficiaries of the Magnuson Act's restrictions on foreign fleets, but that the Act conferred no rights on them. The *Sheffield* court cited *California v. Sierra Club,* 451 U.S. 287, 294 (1981), implicitly likening the Magnuson Act to the Rivers and Harbors Act, 33 U.S.C. § 401, *et seq.,* which, as a general regulatory act, conferred no private rights; the Magnuson Act also is a general regulatory act conferring no rights.

All violations of federal law do not necessarily constitute violations of a federal right. *Golden State Transit v. Los Angeles,* 107 L.Ed.2d at 427. In *Golden State,* this Court set forth a two-pronged analysis for determining whether a federal statute created rights enforceable under § 1983. First, the court must determine whether the statute creates rights by focusing on whether the putative plaintiff is an intended beneficiary of such rights. *Id.* at 430. However, where "Congressional preemption benefits particular parties only as an incident of the federal scheme of regulation . . . § 1983 may not be available." *Id.* Second, the court must determine whether the statute contains a comprehensive enforcement scheme which would preclude private enforcement under § 1983.

This two-pronged analysis should have formed the basis for a finding by the District Court that the Magnuson Act does not create a right enforceable under § 1983, consistent with the opinion of the Ninth Circuit in *Sheffield.* The opinion of the Eleventh Circuit, in affirming the District Court's order awarding attorney's fees, directly conflicts with the holding of the Ninth Circuit in *Sheffield* and this Court should exercise its discretion to review this case in order to decide this issue. SC R10.1(a). In addition, because the federal and state governments are continually expanding their regulation of the increasingly scarce resources of

the sea, this issue will inevitably continue to be raised.[1] This important question of federal law has not been addressed with respect to the Magnuson Act and the conflict between the two circuits which have addressed the question should be resolved by this Court. SC R10.1(c).

THE COURT BELOW HAS DECIDED A FEDERAL QUESTION IN A WAY THAT DIRECTLY CONFLICTS WITH AN APPLICABLE DECISION OF THIS COURT.

This Court held in *Skiriotes v. Florida,* 313 U.S. 69, 73 (1940), that a state regulation of its citizens on the high seas was not an equal protection violation if it applied equally to all persons within the state's jurisdiction. Section 370.151, Florida Statutes, lives up to that standard. This statute was applied to Florida registered vessels on the high seas, the only vessels over which Florida can exert jurisdiction. The District Court gave no explanation why the holding in *Skiriotes* did not apply, and actually announced a diametrically opposite rule. *Bateman,* 716 F.Supp. at 597. Under the holding of the District Court, no Florida regulation could be enforced against only Florida registered vessels on the high seas without violating the equal protection clause. This finding of an equal protection violation by the District Court directly conflicts with this Court's holding in *Skiriotes,* and this Court should exercise its discretion to review this case. SC R 10.1(c).

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1 Two cases currently pending in the District Courts of Florida raise the same issues presented here. *Raffield v. Gissendanner,* case no. 90-50143-WS (N.D. Fla.), and *Southeastern Fisheries v. Martinez,* case no. 90-10071-Civ-King (S.D. Fla.).

CONCLUSION

The lower courts' holdings conflict with the holding of the Ninth Circuit in *Sheffield* and this Court's decision in *Skiriotes*. In addition, this is an important question of federal law which will continue to arise in the context of conflicts between state and federal fisheries regulations which has not been, but should be, addressed by this Court. This Court can and should issue a writ of certiorari to the Circuit Court of Appeals for the Eleventh Circuit reversing that court's holding on the issues raised in this petition and reversing Respondent's award of attorney's fees pursuant to 42 U.S.C. § 1988.

Respectfully submitted,

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APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-10062-CIV-KING

FREEMAN R. BATEMAN,

Plaintiff,

v.

TOM GARDNER,
individually, and as
Executive Director of the
Florida Dept. of Natural
Resources, *et al*,

Defendants.

FINAL SUMMARY JUDGMENT

The court today faces several problems that have resulted from the apparently admirable efforts of Florida and the United States to protect an area of incredible natural beauty, the water surrounding the Dry Tortugas. To preserve the unique sea life in this area, both Florida and the federal government have enacted statutes and regulations that manage fishing in the region. The overall effect of this cooperative effort has been confusion, especially with respect to shrimping. The federal government bars shrimping in certain areas and allows it in others, while Florida prohibits its own shrimpers from shrimping in the entire area.

The plaintiff, a Florida resident and Florida licensed fisherman, brings this action under the Civil Rights Act and the United States Constitution, alleging that he is a victim of unfair discrimination. The recurring statement of the

plaintiff's claim is a violation of the equal protection clause. The plaintiff notes that the Florida statute regulating shrimping prohibits Florida shrimpers from a certain area, but does not prohibit shrimpers registered in other states. The plaintiff seeks a declaration that the metes and bounds description of the shrimping area protected by Florida violates the United States Constitution, and directly conflicts with the Magnuson Act, 16 U.S.C. § 1801, *et. seq.*, and the Gulf of Mexico Shrimp Fishery Management Plan, 50 C.F.R. 658, *et. seq.* After considering the arguments of counsel on the cross-motions for summary judgment, the court finds the plaintiff's contentions are meritorious.

PROCEDURAL HISTORY

In August of 1987, the plaintiff commenced this action seeking declaratory and injunctive relief against the state officials in charge of enforcing *Fla. Stat. Ann.* § 370.1512 (sic), the Florida statute regulating shrimping in the Dry Tortugas. Shortly thereafter, both the plaintiff and the Florida officials cross moved for summary judgment.

After a hearing on the motions for summary judgment, on October 5, 1988, this court preliminarily determined that the plaintiff was being denied equal protection of law as a result of the combined operation of *Fla. Stat. Ann.* § 370.152 (sic) and 16 U.S.C. § 1856(a)(3), a key provision of the Magnuson Fisheries Act. The court ordered that the Attorney General of the United States be notified pursuant to 28 U.S.C. 2403(a) because the plaintiff was making a constitutional challenge to an act of Congress.

On November 4, 1988, the United States sought intervention as a party plaintiff. The government sought to uphold the constitutionality of 16 U.S.C. § 1856(a)(3), and they

contended that no equal protection violation occurred. The government argued that any constitutional challenge to the Florida statute is obviated by the fact that a federal statute preempted the state statute.

All the parties agree that no genuine issue of material fact exists, and, thus, this case can be decided as a matter of law. The court has reviewed memoranda in support of the motions for summary judgment and after reviewing the relevant statutory framework, the court grants the plaintiff's motion for summary judgment.

STATUTORY FRAMEWORK

In 1976, Congress enacted the Magnuson Fisheries Conservation and Management Act, 16 U.S.C. § 1801 *et. seq.* The Act grants the federal government exclusive fishery management authority within the "Exclusive Economic Zone" ("EEZ"). 16 U.S.C. §§ 1801(b)(1), 1811(a). Presidential proclamation 5030, dated March 10, 1983, established the EEZ. The EEZ is a zone or border which extends from the outer boundary of each state's territorial waters to a line two-hundred miles off-shore. *See Proclamation* no. 5030, 3 C.F.R. 22-23 (1983 compilation). The territorial waters of each state are not part of the EEZ.

The Magnuson Act provides that the states cannot regulate, directly or indirectly, any fishing vessel outside their respective territorial borders "unless the vessel is registered under the law of that state." 16 U.S.C. § 1856(a)(3). Prior to the enactment of the Magnuson Act, a state could regulate its state registered vessels and state citizens while fishing in what is now the EEZ pursuant to a line of Supreme Court cases culminating in *Skiriotes v. Florida,* 313 U.S. 69 (1941).

In 1957, prior to the passage of the Magnuson Act, the Florida Legislature enacted *Fla. Stat. Ann.* § 370.151 for the conservation of the supply of shrimp. The state sets out an area of shrimp beds off the coast of the Florida Keys, known as the "Tortugas Shrimp Bed," where shrimp trolling is prohibited. Much of this area is beyond the territorial limits of Florida. In its filings before this court, Florida acknowledges that it has no authority under the Magnuson Act to enforce *Fla. Stat. Ann.* § 370.151 against non-Floridians outside the state's territorial waters.

In 1981, the United States Secretary of Commerce implemented the Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico, as promulgated in 50 C.F.R. part 658. In recognition of the importance of protecting shrimp nursery beds, the management plan has set aside an area in the Gulf EEZ near the Florida Keys in which fishing is generally closed to all shrimp fisherman. 50 C.F.R. § 658.22. This area, known as the "Tortugas Shrimp Sanctuary," is entirely outside the territorial limits of the state of Florida.

The shrimp beds protected by 50 C.F.R. § 658.22 and *Fla. Stat. Ann.* § 370.151 substantially overlap. Nonetheless, a portion of the state-created "Tortugas Shrimp Bed," lying outside the territorial waters of the state of Florida and within the EEZ, is not included within the boundaries of the federally-created "Tortugas Shrimp Sanctuary." In this area, which is in dispute here, federal law permits shrimping, but the application of the Florida statute prohibits Floridian fisherman from doing so.

DISCUSSION

For two reasons, the court finds that the defendant's application of *Fla. Stat. Ann.* § 370.151 is unconstitutional in part. Specifically, both the equal protection and supremacy clauses require that a limited part of this Florida statute be struck down.

The court specifically notes that the impetus for the filing of this action was discriminatory impact. The Florida Legislature desired to prohibit shrimping in this region. The legislature first prohibited all shrimpers from the state's own waters. The legislature, however, did not stop its protection here. The legislature used discretion given to them by the Magnuson Act and prohibited its own shrimpers from the federal area. The net effect of the Florida legislature's action was discrimination against its own citizens, for only they were prohibited from portions of the federal area. The Florida legislature's action in prohibiting its own shrimpers from the federal waters violated the equal protection clause. Moreover, the Florida legislature offered no reason for discriminating against its own citizens in favor of out of state shrimpers. The legislature did not have to prohibit Florida shrimpers from this are. Its decision to do so, however, violated the equal protection clause.

The operation of the supremacy clause also corrects this discrimination. The United States argues that the federal Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico, as promulgated by the Secretary of Commerce, 50 C.F.R. Part 658, preempts *Fla. Stat.* § 370.151(2) insofar as the Florida statute prohibits the plaintiff from shrimping in the disputed area. The United States asserts that under preemption principles, the court can resolve the present controversy. Specifically, the federal government notes that preemption of the Florida statute as it applies to shrimping in the disputed area eliminates the unequal

treatment of persons from different states, the problem which is of the greater concern to this court.

Pursuant to the Supremacy Clause of the Constitution, Art., VI, cl. 2, the laws of the United States, including both federal statutes and federal regulations properly promulgated pursuant to statutory authorization, take precedence over state law. *See, e.g., Hillsborough County, Florida v. Automated Medical Laboratories,* 471 U.S. 707, 714 (1985). Preemption of state law by federal law can occur in several way, including as a result of a conflict between federal and state law. *Id.* at 713, 14; *Schneidewind v. ANR Pipeline Co.* 108 S.Ct. 1145, 1150-51 (1988). Such a conflict occurs when it is impossible to comply with both state and federal law, or when the state law stands as an obstacle to accomplishment of congressional purposes. *Schneidewind,* 108 S.Ct. at 1150-52.

In the present case, *Fla. Stat.* § 370.151(2) conflicts with the federal Gulf Shrimp Plan as promulgated by the Secretary of Commerce. Under the federal regulation, the plaintiff may take shrimp in the disputed area, while under the state statute, he may not. *See State v. Sterling,* 448 A.2d 785 (R.I. 1982)(state fishing law conflicts with federal Magnuson regulation where federal regulation permits larger flounder take than does state law). Moreover, one purpose behind the promulgation of federal Magnuson regulation was to promote domestic commercial fishing. 16 U.S.C. § 1801(b)(3). The Florida statute stands as an obstacle to the accomplishment of this purpose by precluding Florida fishermen from participating in commercial shrimp fishing in the disputed area. Under preemption principles, this conflict must be resolved in favor of the enforcement of federal law. Accordingly, the court

ORDERS and ADJUDGES as follows:

1.*Florida Stat. Ann.* § 370.151(2) violates the

equal protection clause of the U.S. Constitution insofar as it restricts only Florida shrimpers from federal waters.

2.50 C.F.R. Part 658 preempts § 370.151(2) insofar as *Fla. Stat. Ann.* 370.151(2) prohibits shrimping where the federal regulations allow it.

3.The defendants are enjoined from enforcing *Fla. Stat. Ann.* § 370.151(2) in a manner that violates the equal protection clause or conflicts with the applicable federal regulations.

DONE and ORDERED in chambers at the United States District Courthouse, Federal Courthouse Square, Miami, Florida, this 11th Day of July, 1989.

_____/s/_____

JAMES LAWRENCE KING
CHIEF U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF
FLORIDA

sar

cc:David Paul Horan, Esq.
Eric J. Taylor, Asst. AG
Richard Harrison, AUSA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-10062-CIV-KING

FREEMAN R. BATEMAN, SR.,

Plaintiff,

v.

THOMAS GARDNER, Individually and as Executive Director of the Florida Department of Natural Resources; and MAJOR RONALD MCCULLERS, Individually and as Monroe County District IX Supervisor of the Florida Marine Patrol,

Defendants,

and

UNITED STATES OF AMERICA,

Intervenor.

ORDER AWARDING ATTORNEY'S FEES AND COSTS

In August of 1987, the Plaintiff commenced this action seeking declaratory and injunctive relief against state officials who were in charge of enforcing Florida Statute section 370.151(2). This Florida Statute seeks to regulate shrimping in the areas of the Lower Florida Keys and Dry Tortugas. On July 11, 1989, this court entered a Final Summary Judgment. *Bateman v. Gardner,* 716 F. Supp. 595 (S.D. Fla. 1989). The Plaintiff succeeded in all respects and secured an injunction against state interference with federally pro-

tected fishing rights based upon both the Equal Protection and Supremacy Clauses of the United States Constitution.

As prevailing party in this Title 42 USC 1983 action, the Plaintiff filed a Motion for Award of Attorney's Fees and Costs pursuant to Title 42 USC § 1988. The original Motion, Memorandum of Law and supporting Affidavits were filed in August of 1989 with a Supplement filed in September, 1989 and a Final Supplement filed January 5th, 1990.

In September, 1989, the Defendants submitted an extensive Memorandum of Law in Opposition to the Plaintiff's Request for Attorney's Fees. Counsel for the Defendant stipulated in the Memorandum and in open Court that the hours reflected in the billing were reasonable; however, the Defendant's grounds for opposition to portions of the requested fees can be easily divided into three separate grounds. First, the Defendants argued that there is no entitlement to fees for "cases brought under the Supremacy Clause of the United States Constitution" and that the preemption and equal protection holdings by this Court were "not closely related and the research that went into each issue is distinct from the other." The Defendant's second argument was that the Magnuson Act, Title 16 USC 1851 et.seq. did not create any rights, privileges or immunities for individuals which would be actionable under Title 42 USC 1983. Finally, the Defendants argued that "Plaintiff is entitled to no enhancement (of lodestar) whatsoever" in that "the issues were clear-cut and straight-forward". In arguing against any enhancement of lodestar, the Defendants stated that "Plaintiff has failed to produce any evidence that he would have been unable to hire counsel without the risk enhancement in the Key West or Miami area".

The Plaintiff, as the prevailing party in this civil rights litigation is entitled to an award of attorney's fees and costs. In holding that the Plaintiff is entitled to fees for all of the

hours expended, the Court notes that while it is abundantly clear that the Supremacy Clause *of its own force* does not create rights enforceable under § 1983, the Magnuson Act itself and the Fishery Management Plans adopted under the Act do grant rights enforceable under § 1983. The Magnuson Act does not preclude a § 1983 remedy as it provides no mechanism to address state interference with federally protected fishing rights. As the Court pointed out on page 6 of its Final Summary Judgment, "under the federal regulation, the Plaintiff may take shrimp in the disputed area, while under the state statute, he may not." The Plaintiff showed that not only was Florida's enforcement a violation of federally protected fishing rights, but the enforcement violated Equal Protection rights in it's application.

The Plaintiff by relying on the Supremacy Clause to enjoin interference with federally protected fishing rights and by demonstrating violation of rights to equal protection under the law, has prevailed in this litigation under §1983, therefore, all of the hours spent in both preemption and equal protection research are compensable under 42 USC § 1988.

This Court further holds that the Plaintiff's claims arose out of a common core of facts and involve related legal theories. The Court holds that all of the issues, supremacy/preemption/equal protection were interrelated and inextricably intertwined. It was pointed out in *Hensley v. Ekhart,* 461 U.S. 424, 432 (1983) that "where a law suit consists of related claims, a Plaintiff who has won substantial relief should not have his attorney's fees reduced simply because the District Court did not adopt each contention raised."

The Defendant's second argument that the Magnuson Act "does not create any rights, privileges, or immunities for individuals" is in error. The Magnuson Act was enacted to benefit and protect commercial fishermen like the Plaintiff.

It mandated, under 16 USC § 1851(4) that . . . "conservation management measures shall not discriminate between residents of different states". An action under § 1983 certainly provides a mechanism to address state interference with federally protected fishing rights under the Magnuson Act.

The Plaintiff, a commercial fisherman, is the intended beneficiary of a federal statutory scheme that gives all United States fishermen the continued right to make use of the federal fishery resources of the EEZ. The violation of a federal right that is implicit in a statute's language and structure is as much a "direct violation" of a right as is the violation that is clearly set forth in the text of the statute. *Golden State Transit Corp. v. City of Los Angeles,* 110 S.Ct. 444 (1989).

The Defendant's final argument regarding enhancement of lodestar has been dealt with repeatedly by the federal courts. In March of 1989, the Eleventh Circuit decided in *Lattamore v. Oman Construction,* 868 F.2d 437 (11th Cir. 1989) and in July of 1989, the Ninth Circuit decided *Hasbrouck v. Texaco, Inc.,* 79 F.2d 632 (9th Cir. 1989). Both of these cases held that a multiplier of lodestar is justified as an adjustment for the risk of not prevailing. In *Hasbrouck,* the Ninth Circuit recognized "that competent counsel would not undertake representation of Plaintiffs in cases such as this if they were only paid their regular hourly rates." In *Lattamore,* Judges Fay Anderson and Henderson, upheld the District Court's award by stating, "that the relevant market for legal services enhances fees for contingency as a class by one hundred (100%) percent at the very least and that without enhancement, Plaintiff would have faced substantial, and probably insurmountable, difficulties in finding counsel in the relevant market."

The Plaintiff, in support of his request for a 2.5 lodestar enhancement, submitted the Affidavits of three (3) attor-

neys possessing a total of sixty (60+) years of trial experience. In all three (3) Affidavits, the attorneys concluded that none of them (nor any other attorney they knew) would have taken this case on a contingent fee basis without a substantial increase over their regular hourly fee. Finally, the Court notes that in light of the past decision of the Third District Court of Appeals in the case of *Potter v. McCullers,* 505 So.2d 511, (Fla. 3rd DCA 1987), which affirmed the Circuit Court validation of the state's extraterritorial enforcement of § 370.151(2) over Florida citizens, it is clear that the chances for success at the outset of this litigation were very unlikely. Based upon the contingent risk taken by Plaintiff's counsel, the lodestar enhancement should range from approximately 1.5 (where success is more likely than failure at the outset) to as much as 2.5 to 3.0 (when chances of success are unlikely at the time the case is initiated). See *Figa and Ranger Insurance Co., v. R/V M P Corp.,* 681 F.Supp. 806 (S.D. Fla. 1988). It is the finding of this Court than an enhancement for contingency of 2.0 is appropriate for the hours expended by Plaintiff's counsel especially in this case where the outcome of the case was in doubt. For those hours expended since the Court determined Plaintiff to be the prevailing party, no enhancement of lodestar would be justified.

The Court having considered the factors set out in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974), finds that 103.1 hours were spent by attorney David Paul Horan prior to the time the outcome of the case was decided by this Court and an additional 71.5 hours was spent by a Junior Partner in his firm, Edward W. Horan. The Court finds that the customary billing in the relevant legal community for services regarding equally complex federal litigation is $200.00 per hour for David Paul Horan and $150.00 per hour for Edward W. Horan. Multiplying these rates times the hours spent, the lodestar subject to enhancement is Thirty-one Thousand, Three Hundred

Forty-five and No/100 ($31,345.00) Dollars and with enhancement of 2.0, a total of Sixty-two Thousand, Six Hundred Ninety and No/100 ($62,690.00) Dollars. The Court finds that David Paul Horan expended 59.8 hours which are not subject to enhancement, yielding a lodestar of Eleven Thousand, Nine Hundred Sixty and No/100 ($11,960.00) Dollars. Edward W. Horan spent an additional 27.8 hours which are not subject to enhancement, yielding a lodestar of Four Thousand, One Hundred Seventy and No/100 ($4,170.00) Dollars. The total lodestar plus enhancement where appropriate yields total attorney's fees of Seventy-eight Thousand, Eight Hundred Twenty and No/100 ($78.820.00) Dollars. Plaintiff's costs (undisputed by the defendants) were in the amount of One Thousand, Five Hundred Seventy-nine and 76/100 ($1,579.76) Dollars are taxed against the defendant. Plaintiff's fees plus costs, yield a total of Eighty Thousand, Three Hundred Ninety-nine and 76/100 ($80,399.76) Dollars to be taxed against the defendants, for which let execution issue.

DONE and ORDERED in chambers at the United States District Courthouse, Federal Courthouse Square, Miami, Florida, this 12th day of January, 1990.

_____/s/_____

JAMES LAWRENCE KING
CHIEF U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF
FLORIDA

cc: All counsel of record.

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

Nos. 89-5851 & 90-5125

D.C. Docket No. 87-10062-CIV-KING

FREEMAN R. BATEMAN, SR.,

Plaintiff/Counter-defendant Appellee,

versus

THOMAS GARDNER, individually and as Executive Director of Florida Department of Natural Resources, MAJOR RONALD MCCULLERS, Individually and as Monroe County District IX Supervisor of the Florida Marine Patrol,

Defendants/Counter-plaintiffs-Appellants,

UNITED STATES OF AMERICA,

Intervenor-Appellee.

Appeals from the United States District Court for the Southern District of Florida

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(December 20, 1990)

Before HATCHETT and ANDERSON, Circuit Judges, and ESCHBACH,* Senior Circuit Judge.

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*Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

PER CURIAM:

Case No. 89-5851 (the merits appeal) is affirmed on the basis of the district court's opinion dated July 11, 1989.

In light of the foregoing affirmance of the merits case, Case No. 90-5125 (the attorney's fee appeal) is affirmed pursuant to the concession of appellant, both in motion to this court and at oral argument.

AFFIRMED.

[1]370.151 Tortugas shrimp beds; closed areas; permits; penalties.—

(1) It is the intention of the Legislature that action should be taken to conserve the supply of shrimp in the large shrimp beds which lie in and around the coast of the Lower Keys of Florida and in the vicinity of the islands of Dry Tortugas in the Florida Keys, hereinafter referred to as the "Tortugas Shrimp Bed," and which furnish more than 50 percent of the shrimp in waters adjacent to the coast of Florida. It is further the sense of this Legislature that the shrimp industry is a valuable industry to the economy of this state and deserves adequate protection.

(2) Tortugas Shrimp Bed is described as follows:

(a) Begin at Coon Key Light in Collier County; thence proceed on a straight line to a point which is located at 25°54′30″ north latitude and 81°50′30″ west longitude; thence proceed on a straight line to a point located at 24°48′00″ latitude and 82°00′00″west longitude; thence proceed on a straight line to a point located at 24°45′00″ north latitude and 82°22′30″ west longitude; thence proceed on a straight line to Rebecca Shoals Light; thence proceed on a straight line to R. B. Bell Buoy; thence proceed on a straight line to Sand Key Light; thence proceed northerly to the abandoned lighthouse located in the southwest portion of Key West; thence along the south and east meandered shoreline of the Florida Keys and the connecting viaducts between said Keys to 80°30′00″ west longitude; thence north until a point on the mainland is reached; thence proceed west and north along the coast of the mainland of Florida until a point is reached which is located due north of the aforementioned Coon Key Light located in Collier County; thence due south to Coon Key Light, the point of beginning.

(b) No shrimping shall be permitted at anytime except live bait production as provided in this chapter in the above-described area.

North Pacific Fishing Vessel Owners' Association, et al.,
Plaintiffs-Appellants,

v.

Bill Sheffield, Governor, State of Alaska, et al.,
Defendants-Appellees.

No. 87-3646

United States Court of Appeals, Ninth Circuit.
Argued and Submitted June 8, 1988.
Decided July 7, 1988.

D. Alaska

AFFIRMED.

[Respondent's Note: The following is excerpted from the unpublished part of the opinion.]

Appeal from the United States District Court for the District of Alaska; James M. Fitzgerald, District Judge, Presiding.

Before EUGENE A WRIGHT, FERGUSON and BRUNETTI, Circuit Judges.

The North Pacific Fishing Vessel Owners' Association (NPFVOA) and two individual named plaintiffs (collectively hereinafter "appellants") appeal the district court's denial of their motion for attorney's fees under 42 U.S.C. § 1988. Appellants claim that the district court erred in ruling that they were not entitled to attorney's fees because they had not made a cognizable claim under 42 U.S.C. § 1983. Appellants argue that they made a valid statutory claim under the Magnuson Fishery Conservation and Management Act (Magnuson Act), as well as valid constitutional claims under

the Supremacy Clause, the Commerce Clause, the Due Process and Equal Protection clauses of the Fourteenth Amendment, and under the Privileges and Immunities Clause of Article IV, section 2, and that any one of these provided a basis for a section 1983 claim.

I.

In 1978, the Secretary of Commerce, acting under the authority of the Magnuson Act (16 U.S.C. §§ 1801-1882), promulgated regulations which restricted vessels operating in Alaska's various geographic fishing areas delineated in the Act. These areas, or "Fishing Control Zones" ("FCZs"), encompassed the oceanic expanse from the Alaska's territorial boundary of three miles to a line 200 miles offshore. The relevant regulations defined certain areas to be nonexclusive. See 50 C.F.R. §§ 671.23, 671.24 (suspended 51 Fed.Reg. 40,027, 40,029 (1986), repealed 52 Fed.Reg. 17,577, 17,579 (1987)).

In March of 1983, the state of Alaska's Board of Fisheries adopted regulations for the 1984 Tanner crab season which designated as "super-exclusive" the same FCZS referenced in the federal regulations. Under these state regulations, anyone registered to take Tanner crab in the super-exclusive areas would not be permitted to fish or take crab in any other area. Violation of these regulations could result in potential seizure of the vessel and arrest. In addition, the state regulations placed restrictions on the number of crab pots that each vessel could use while operating in a separate area defined as the Kodiak District.

Shortly after the state adopted these regulations, the North Pacific Fishery Management Council, an advisory council to the Secretary of Commerce, considered whether the federal government should adopt the state restrictions at issue. The Council ultimately rejected the idea in Septem-

ber of 1983 in part because the Council found that, while unable to make a "quantitative estimate," they believed that the proposed regulations could have a disparate impact between "local" and "non-local" vessels.[1]

Just prior to the scheduled February 10 opening of the Tanner crab season, the governor's office issued a press release which stated that these new regulations would be specifically enforced. Shortly thereafter, appellants filed a complaint seeking declaratory and injunctive relief against enforcement of the state regulations. On February 9, the district court granted a temporary restraining order. That same day, the Alaska Board of Fisheries repealed the challenged regulations.

Appellants subsequently filed for attorney's fees. At a hearing on the motion, counsel for the state raised the possibility that the state might try to reenact the challenged regulations. Since such action would require appellants to go to trial on the merits of their claims — and thus possibly increase their attorney's fees — the court reserved its decision on appellants' motion for fees.

The parties later stipulated to a dismissal of the action, conditioned upon the state's agreement not to implement similar regulations in the future. Appellants then filed a supplemental motion for attorney's fees. On June 21, 1985 the district court issued an order dismissing the case, "subject to plaintiffs' motion and supplemental motion for an award of attorney's fees, costs, and expenses, both parties having reserved the right to appeal said disposition."

The district court's original dismissal order was premised exclusively on appellants' preemption claim. None of the

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1 The Council defined local vessels to be "all boats whose home port was Chignik, Sand Point or King Cove, owned by a local resident who fishes predominantly in this area."

other constitutional claims were mentioned. On January 21, 1987, after supplemental responses had been made by both parties, the district court issued an order denying the appellants' motion for attorney's fees. The court stated that, while appellants had "prevailed on the merits," they had failed to state any cognizable section 1983 claim. The court also stated that it had relied primarily on the Supremacy Clause challenge in granting the temporary restraining order, and neither that claim nor any of appellants' other claims sufficiently supported a request for attorney's fees under section 1988.

* * *

[II] A.

Appellants claim that they have a cause of action to enforce the Magnuson Act under section 1983 which entitles them to collect attorney's fees under section 1988. We disagree.

In *Maine v. Thiboutot,* 448 U.S. 1 (1980), the Supreme Court held that individuals may have a section 1983 cause of action against state officials for violations of federal statutes. However, two exceptions to this presumption that a section 1983 remedy exists were recently summarized by the Court as follows:

> where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of 1983.

Wright v. City of Roanoke Redevelopment & Housing Authority, [479 U.S. 418, 423] 107 S.Ct. 766, 770 (1987).

Regarding the first exception, this court has stated that where a statute's enforcement scheme is sufficiently comprehensive, an intent to foreclose private enforcement can

be inferred. *Almond Hill School v. United States Department of Agriculture,* 768 F.2d 1030, 1035 (9th Cir. 1985).

The Magnuson Act provides various enforcement mechanisms, and remedies including civil fines, civil forfeiture, and criminal penalties. 16 U.S.C. §§ 1858-1860. Enforcement responsibility for the Act has been entrusted to the Secretary of Commerce and "the Secretary of the department in which the Coast Guard is operating," and their delegatees. 16 U.S.C. § 1861(a). Section 1856(b) is especially relevant to the instant case in that it addresses circumstances in which state regulation lies in direct conflict with the federal regulatory scheme. The section provides that the Secretary of Commerce may exercise preemptive powers over a state fishing regulation, inter alia, where the state action "will substantially and adversely affect the carrying out of [the federal] fishery management plan...." 16 U.S.C. § 1856(b)(1)(B).

We hold that by enacting this comprehensive remedial scheme, Congress intended to foreclose private enforcement of the Act through section 1983.

Even if we did not find that appellants' cause of action was barred by the Act's comprehensive remedial scheme, however, appellants would still be barred by the second exception to the presumption of section 1983 availability because the Magnuson Act does not create enforceable rights in favor of appellants. Appellants contend that the Magnuson Act gives them a "right to fish." To have a federal right cognizable under section 1983, appellants must be members of the class for whose particular benefit the Magnuson Act was enacted. *See Boatowners and Tenants Association v. Port of Seattle,* 716 F.2d 669, 672 (9th Cir. 1983) (reiterating the *Cort v. Ash,* 422 U.S. 66 (1975), analysis for implying private rights of action from statutes). "The question is not simply who would benefit from the Act, but whether Congress

intended to confer federal rights upon those beneficiaries." *California v. Sierra Club,* 451 U.S. 287, 294 (1981). While appellants are beneficiaries of the Act because of the Act's restrictions on foreign fleets, we find nothing in the statute which demonstrates that Congress intended to confer federal rights on them. *Cf. Boatowner,* 716 F.2d at 673 ("There is no indication that the statute was intended to benefit specially the pleasure craft owners ... nor that Congress intended to confer federal rights on [them]."). Rather, the Act was passed to protect the domestic fisheries from depletion. *See Washington State Charterboat Association v. Baldridge,* 702 F.2d 820, 823-4 (9th Cir. 1983), *cert. denied,* 464 U.S. 1053 (1984), and therefore does not confer rights upon appellants.[2]

Having concluded that the statutory enforcement provisions are exhaustive and that the Magnuson Act does not confer "enforceable rights" upon appellants, it is clear that the district court did not err in concluding that appellants do not have a section 1983 claim under this theory.

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2 Appellants claim that Congress' intent to create a privately enforceable right through the Magnuson Act is demonstrated in the Act's requirement that federal regulations "not discriminate between residents of different states," 16 U.S.C. 1851(a)(4), and through the Act's introduction, articulating the Congressional policy that implementation of the Act be responsive to the needs of U.S. citizens and not unnecessarily impede legitimate uses of the high seas. 16 U.S.C. 1801(c)(2)-(3). Viewed in context, those sections confer neither substantive rights, nor an enforcement right.

§ 658.22 Tortugas shrimp sanctuary.

The area commonly known as the *Tortugas Shrimp Sanctuary,* off the State of Florida, is closed to trawl fishing. The area is that part of the EEZ shoreward of a line connecting the following points (see figure 1):

Point	Latitude	Longitude	Common name
N	25°52.9′N	81°37.95′W	Coon Key Light
F	24°50.7′N	81°51.3′W	
G	24°40.1′N	82°26.7′W	New Grounds Shoals Light
H	24°34.7′N	82°35.1′W	Rebecca Shoals Light
P	24°34.7′N	82°08′W	Marquessas Keys

United States Code Annotated
Title 16 § 1856(3)

(3) Except as otherwise provided by paragraph (2), a State may not directly or indirectly regulate any fishing vessel outside its boundaries, unless the vessel is registered under the law of that State.

United States Code Annotated
Title 42 § 1983

§ 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

* * *

United States Code Annotated
Title 42 1988

§ 1988. Proceedings in vindication of civil rights; attorney's fees

* * *

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, Title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

No. 89-5851

FREEMAN R. BATEMAN,
Plaintiff/Appellee

v.

THOMAS GARDNER, et al.,
Defendants/Appellants

and

UNITED STATES OF AMERICA,
Intervenor/Appellee

MOTION FOR MODIFICATION OR CLARIFICATION OF JUDGMENT

Intervenor-Appellee United States hereby moves for modification or clarification of the Court's *per curiam* decision of December 20, 1990. In particular, the United States believes it is essential for the Court to set forth its rationale for affirming the district court. We do not petition for rehearing, because it is possible that this Court's decision simply stands for the proposition that the Florida statute at issue is preempted by operation of the Supremacy Clause, due to a conflict with applicable federal regulations implementing the Magnuson Fishery Conservation Act. However, if the decision also stands for the proposition that state efforts to regulate their own vessels in the Exclusive Economic Zone (EEZ) deny the equal protection of the laws, the case would then have serious negative ramifications for the implementation of the Magnuson Act. The specific grounds for this request are as follows:

This Court's decision affirmed the judgment below "on the basis of the district court's opinion dated July 11, 1989." The district court found that the Florida statute in question was invalid (insofar as it applied to Florida vessels in the Exclusive Economic Zone) under the Equal Protection clause of the Fourteenth Amendment and under the Supremacy Clause of the Constitution. *Bateman v. Gardner,* 716 F. Supp. 595, 597-598 (S.D. Fla. 1989). In our brief, we urged this Court to affirm on the basis of the Supremacy Clause rationale only, since the Equal Protection ruling appeared to create a direct conflict with *Skiriotes v. Florida,* 313 U.S. 69 (1941)(see U.S. Br. at 14, 26-28).

It is important that this Court spell out whether and to what extent it agrees with the equal protection rationale of the district court. Does the Court believe that the equal protection rationale is essentially dicta, since the judgment rests on an independent ground (i.e., preemption)? Does the Court, on the other hand, believe that the Florida statute denies equal protection, and if so, is it because all state statutes which impose stricter regulations on their own fishermen in the EEZ are unconstitutional, or because this particular enactment was infirm? If the latter, was the infirmity due to the Florida legislature's asserted failure to explain the reasons for regulating only Florida fishermen, as some language in the district court decision suggests, 716 F. Supp. at 497, or some other reason.[1]

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1 In our view, it should not be necessary for a state legislature to explain why it only regulates its own fishermen, since it is obvious that a state has no jurisdiction to regulate the fishermen of other states who are fishing in the EEZ.

The district court opinion is ambiguous as to whether its equal protection rationale would apply to all state efforts to regulate in the EEZ or only to those efforts that are not sufficiently explained by the legislature.

This case would not appear to fit the usual criteria for unpublished opinions. In particular, whenever a federal court strikes down a state statute as invalid under the United States Constitution, an explanation would appear to be warranted. Here, the district court's explanation for its equal protection ruling was extremely brief and failed to deal with the Supreme Court's most recent ruling on the issue of state regulation of fishing outside a State's territorial waters. In *Skiriotes,* 313 U.S. at 75, the Supreme Court squarely held that Florida's regulation of sponge fishing by its own citizens outside Florida waters did not violate the equal protection guarantee. Neither the district court nor this Court has explained why *Skiriotes* is not applicable here.

These issues are important to the federal government as well as to the states. In implementing the Magnuson Act, the federal government must at all times rely on a state's regulation of its own vessels in the EEZ, *e.g.,* before a Fishery Management Plan can be put in place, or where a state management measure is consistent with the Fishery Management Plan. Non-conflicting state regulation of state-registered vessels in the EEZ is specifically authorized by Section 306(a)(3) of the Magnuson Act, 16 U.S.C. 1856(a)(3). If, contrary to *Skiriotes,* this sort of regulation is constitutionally infirm, an important element of the fishery protection scheme established by the Magnuson Act will have been lost. Thus, it is essential that the Court spell out whether and to what extent such regulation may violate the equal protection guarantee. There is bound to be further litigation over the states' powers in the EEZ,[2] and much

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2 Indeed, there is currently pending in the Southern District of Florida a case challenging as violative of equal protection Florida's regulations setting landing limits on mackerel harvested in the EEZ. *Southeastern Fisheries Assoc. v. Martinez,* No. 90-10071-Civ-King (complaint filed October 4, 1990).

time will be spent trying to resolve what precedential effect, if any, the instant decision may have. It would conserve judicial resources, as well as those of future litigants, if the Court would take this opportunity to explain the basis for its decision herein. For the reasons set out in our brief, we continue to believe that the only sustainable rationale for upholding the district court's judgment is one that relies on preemption, rather than equal protection.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Modification or Clarification of Judgment have today been served upon counsel by placing the same in the United States mail, postage prepaid, properly addressed, this 3rd day of January, 1991, to:

Eric J. Taylor
Assistant Attorney General
Office of the Attorney General
The Capitol
Tallahassee, Florida 32399-1050

David Paul Horan
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_____/s/_____
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